No. 20,766

IN THE

United States Court of Appeals

For the Ninth Circuit

SOUTHPORT LAND & COMMERCIAL COMPANY,
Appellant,

vs.

STEWART UDALL, as Secretary of the Interior,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Southport Land and Commercial Company (Southport) filed this action in the United States District Court for the Northern District of California, Southern Division, on May 15, 1964, and filed its Amended Complaint in said action on October 6, 1965 (R. p. 6). Jurisdiction in the Court below is based upon 43 U.S.C. Section 1161 et seq. and 28 U.S.C. Section 1331. Venue lies under 28 U.S.C. Section 1391. On November 26, 1965, the Court below, per the Honorable Albert E. Wollenberg, entered its order dis-

missing appellant's Amended Complaint and the action as to defendant Stuart Udall as Secretary of the Interior (R. pp. 30-31). (The action had already been dismissed as to the other defendants on November 18, 1965.) On December 9, 1965, Southport filed its Notice of Appeal herein (R. p. 34). This Court has jurisdiction under the provisions of 28 U.S.C. Section 1291.

STATEMENT OF FACTS

The Amended Complaint alleges, inter alia, that Southport is a California corporation and the successor in interest to the Black Diamond Coal Mining Company (R. p. 6); that plaintiff or its predecessor in interest have been in continuous possession of the North one-half of Section 8, Township 1 North, Range 1 East M.D.M. since 1883; that on April 25, 1883, Black Diamond received Cash Coal Entry No. 13 to the above described property; that on May 7, 1883, the Commissioner of the General Land Office purported to cancel and vacate Cash Coal Entry No. 13 without notice or hearing to Southport (R. p. 7).

The Amended Complaint further alleges that plaintiff paid over $100,000 to acquire title to said property; paid all real property taxes assessed against it; has redeemed the property following tax sales for non-payment of taxes; has been in continuous possession of the property from 1883 to the present time; learned for the first time of said purported cancellation of its entry during a 1961 title search; and

that on March 20, 1963, plaintiff filed with the Bureau of Land Management, Department of Interior, a request for an adjudication that it was entitled to a patent to the property upon principles of justice and equity under 43 U.S.C. Section 1161 et seq. (R. pp. 7-8).

The Amended Complaint further alleges that this request was denied without a hearing by a final administration decision on June 15, 1964; that this decision was based on secret reports, memoranda, and other evidence which defendant Udall has refused and still refuses to disclose to plaintiff; and that defendant Udall acted unconstitutionally and ultra vires his authority in denying plaintiff's petition on the basis of said secret documents and without a hearing.

SPECIFICATIONS OF ERRORS RELIED UPON BY APPELLANT

1. The Court erred in dismissing plaintiff's complaint and the action as to defendant Stewart Udall upon the ground that it did not state facts sufficient for a judicial review of the administrative orders and decisions of said defendant and his predecessors.

2. The Court erred in dismissing plaintiff's complaint and the action upon the ground that plaintiff did not allege facts sufficient to state a claim against defendant Stewart Udall individually and as an officer of the United States.

3. The Court erred in holding that the matters complained of in plaintiff's complaint were within the

sole discretion of defendant Stewart Udall and that the Court had no jurisdiction in this action.

4. The Court erred in holding that the United States is an indispensable party herein.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT IT HAD NO JURISDICTION TO ORDER SECRETARY OF INTERIOR STEWART UDALL TO ISSUE A PATENT OR HOLD A HEARING UNDER TITLE 43, SECTION 1161, UNITED STATES CODE.

I. APPELLANT IS ENTITLED TO A HEARING UNDER 43 U.S.C. SECTION 1161.

The Amended Complaint alleges that appellant's request for an adjudication under Section 1161 was denied without a hearing on January 15, 1964. Section 1161 provides as follows:

> The Secretary of Interior, or such officer as he may designate, is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of Interior, consistently with such principles, all cases of suspended entries of public lands and of suspended preemption land claims, and to adjudge in what cases patents shall issue upon the same.

Although counsel has not been able to locate any decisions defining the type and scope of hearing required by Section 1161, the statute itself furnishes a guide as to the type of hearing required by stating that there must be an adjudication *"upon principles of equity and justice as recognized in courts of equity."*

The further reference in the statute that the Secretary must *"adjudge in what cases patents shall issue"* manifests a clear legislative intent to require the Secretary to hold a hearing affording the parties the traditional rights permitted in a Court trial, including the right to introduce oral and documentary evidence, to cross-examine adverse witnesses and to argue the case. In referring to this statute, one Court stated:

> "Such cases are not left by the law to be finally determined by the land department under the general provisions of the statute, giving to the Secretary of Interior and the commissioner of the general land office control of the administration of the public land business, and vesting those officers with the powers of a special tribunal to determine disputed questions of fact. *On the contrary, the law requires cases of suspended entries to be tried according to the principles of equity,* and under definite rules of procedure to be prescribed, and constitutes a different special tribunal invested with power to adjudicate in such cases." (Emphasis added.) *Stimson Land Co. v. Hollister,* 75 Fed. 941, 945 (1896).

Moreover, it seems obvious from the language of the statute that it imposes an adjudicatory function upon the Secretary. If so, the hearing conducted pursuant thereto must also meet the minimal standards required by the Administrative Procedure Act as to adjudicatory hearings, 5 U.S.C. Section 1001 et seq.

In every case where a statute requires an adjudication to be determined on the record after opportunity for an agency hearing, the Administrative Procedure Act provides that:

> "(b) *Procedure.* The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals for adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with Sections 1006 and 1007 of this title." 5 U.S.C. Section 1004.

Where a hearing is required under Section 1004, the Act provides that:

> "(c) . . . Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . .
>
> "(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with Section 1007 of the title. . . ." 5 U.S.C. Section 1006.

This Court has specifically held that the Administrative Procedure Act is applicable to Department of Interior hearings relating to mining claims and entries on the public lands, see *Adams v. Witmer,* 271 Fed. 2d 29, 32-33 (9th Cir., 1959); *Stewart v. Penney,* 238 F. Supp. 821, 827 (D.C. Nev., 1965).

Moreover, in passing upon the petition, the Secretary made a decision affecting appellant's legal rights and under such circumstances the Supreme Court has said:

> Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. *Hannah v. Larche,* 363 U.S. 420 at 442 (1960).

The primary error of the court below was caused by its erroneous belief that plaintiff's Amended Complaint did not raise any new issues not pleaded in the original Complaint (R. pp. 30-31). To the contrary, the original Complaint merely alleged that the Secretary's final decision was "arbitrary, biased and contrary to the law and fact" (R. p. 4). The original Complaint prayed for a mandatory order compelling the Secretary to approve the issuance of a patent to appellant (R. p. 5). The Amended Complaint, on the other hand, alleges that the Secretary failed and refused to hold a hearing on appellant's request for an equitable adjudication and failed and refused to exercise the discretion required of him by Section 1161 (R. pp. 8-9). Based on these new allegations, the Amended Complaint concludes with a prayer asking not only for a mandatory order compelling the Secretary to issue a patent, but, alternatively, that the Court issue a mandatory order compelling defendant Udall to hold a hearing and exercise his discretion as required by Section 1161 (R. p. 13). Thus, the second cause of action in plaintiff's Amended Complaint alleges entirely new facts and requests a different kind of relief than that prayed for originally.

II. THE COURT BELOW HAS JURISDICTION TO ISSUE A MANDATORY ORDER DIRECTING THE SECRETARY OF INTERIOR TO PERFORM A DUTY REQUIRED BY STATUTE.

The Court below based its decision in part upon the distinction between the ministerial and discretionary duties of government officers. It reasoned that the Courts have no jurisdiction to compel an officer to exercise a discretionary duty, but may require him to exercise a ministerial duty (R. pp. 27-29). Although this distinction has been criticized as limiting too strictly the Court's power in dealing with governmental agencies, see *Seaton v. Texas Co.,* 256 Fed. 2d 718, 723 (DC Cir. 1958), it nevertheless empowers the Court to order the Secretary to hold a hearing in the present case. As demonstrated above, Section 1161 imposes a mandatory duty upon the secretary to make an adjudication. The Amended Complaint alleges that he refused to do so. Since the obligation to hold a hearing is statutory, the Secretary has no discretion in the matter and the Courts have ample power to compel him to perform his statutory obligations. See *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (1962), requiring the Postmaster General to carry certain mail; *Greene v. McElroy,* 360 U.S. 474 (1959), requiring the Secretary of Defense to issue a security clearance; *Vitarelli v. Seaton,* 359 U.S. 535 (1959) requiring the Secretary of Interior to reinstate a federal employee.

The very cases relied upon by the Secretary in the Court below establish appellant's right to a writ of mandate in the present case. In *Larsen v. Domestic and Foreign Corporation,* 337 U.S. 682 (1949), which

held that the Court could not enjoin a government officer from disposing of war assets to plaintiff's competitor, the Court specifically held that a suit could be maintained against a government officer where he has acted "unconstitutionally" or "ultra vires his authority." 337 U.S. at 693. In *Malone v. Bowdoin,* 369 U.S. 643 (1962), which held that the plaintiff could not maintain an ejectment action against a forest service officer, the Court explained *Larsen* as follows:

> "Cutting through the tangle of previous decisions, the Court [in *Larsen*] expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is *'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void,'* 337 U.S. at 702. Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States." (Emphasis added.) 369 U.S. at 647.

In the present case, it is clear that the Amended Complaint alleges that the defendant acted in excess of his statutory authority in denying plaintiff's petition for a patent without holding a hearing in conformity with the Administrative Procedure Act or 43 U.S.C. Section 1161.

Moreover, the Secretary's arbitrary denial of the petition unconstitutionally deprived plaintiff of his property without due process of law. Although the Secretary argued below that appellant could obtain judicial review of the agency action under Section 1009 of the Administrative Procedure Act (R. p. 22), review is foreclosed as a practical matter because the Secretary, by refusing to hold a hearing, has not afforded plaintiff an opportunity to make a proper record for review.

III. THE ADMINISTRATIVE PROCEDURE ACT PROVIDES FOR THE ISSUANCE OF A MANDATORY ORDER DIRECTING THE SECRETARY TO HOLD A HEARING.

The Administrative Procedure Act provides that in the absence of an adequate statutory review proceeding, review may be by any applicable form of legal action "(including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)." 5 U.S.C. 1009 (b). It further provides that the Court "shall (A) compel agency action unlawfully withheld or unreasonably delayed. . . . ." 5 U.S.C. 1009 (e).

In the present case appellant has alleged that the Secretary refused to hold the hearing required by 43 U.S.C. Section 1161. This clearly states a basis for the Court to "compel agency action unlawfully withheld."

While the Amended Complaint did not specifically allege jurisdiction under the Administrative Proce-

dure Act because the Court below had rejected this as a basis for jurisdiction in dismissing the original Complaint (R. p. 27), this omission could have been easily corrected by further amendment and should not have resulted in a dismissal of the Amended Complaint without leave to amend. As this Court has pointed out:

> "leave to amend should be allowed unless the complaint 'cannot under any conceivable state of facts be amended to state a claim.' (citation) Leave to amend should be granted 'if it appears at all possible that the plaintiff can correct the defect.' 3 Moore, Federal Practice, Section 15.10 at 838 (2d Ecl. 1948)." *Breier v. No. Calif. Bowling Proprietor's Ass'n,* 316 F.2d 787, 790 (9th Cir. 1963).

IV. THE DISTRICT COURT ERRED IN HOLDING THAT IT HAD NO JURISDICTION TO ORDER DEFENDANT UDALL TO ISSUE A PATENT.

The Court below concluded that it had no jurisdiction to order a patent to issue in the present case because the issuance of such a patent lies in the sole discretion of the Secretary of Interior (R. pp. 28, 30-31). Appellant respectfully submits that the Court has ample authority to direct that a patent issue in a proper case, because, although the jurisdiction of the Secretary over the public lands may be plenary, it is subject to judicial review. In *Best v. Humboldt Mining Co.,* 371 U.S. 334 (1963), the Supreme Court specifically held that a mining claimant can secure judicial review where his claims are denied and cited a case wherein the claimant sued the Secretary of

Interior individually. See 371 U.S. at 338 and Footnote 7 to the Court's opinion. As pointed out in *Stewart v. Penney,* 238 F. Supp. 821 (1965), which rejected the Secretary's claim that his finding of noncompliance with the requirements for homestead entry are binding upon the Courts:

> " 'Thus the case really comes down to a question whether the Secretary's finding was supported by substantial evidence on the record as a whole.' *Foster v. Seaton,* 1959, 271 F 2d 836."

This Court reached the same conclusion in *Adams v. Witmer,* 271 F. 2d 29 (9th Cir., 1959), which held that a mining claimant could maintain an action against subordinate officials of the Interior Department, specifically rejecting the government's argument that the action was not maintainable because it required "mandatory affirmative relief." 271 F. 2d at 38. A mining claimant has always had the right in a proper case to obtain a writ of mandate to compel the Land Department to issue a patent. See *Roberts v. United States ex rel. Valentine,* 176 U.S. 221 (1900); *Ballinger v. United States ex rel. Frost,* 216 U.S. 240 (1910); *Work v. United States ex rel. McAllister,* 262 U.S. 200 (1923); *Adams v. Witmer,* supra. In *Lane v. Hoglund,* 244 U.S. 174 (1916), the Secretary of Interior cancelled an *entry* upon the public lands on the basis of information from a subordinate government official that the applicant had not complied with the provisions of the Homestead Act. The Court granted a writ of mandate which compelled the Land Department to vacate the order of cancellation and directed it to issue a patent to the land. In answer

to the Secretary's assertion that the Homestead Act vested complete discretion with respect to the issuance of the patent, the Court said:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. . . . But that does not necessarily and in all cases make the duty of the officer anything more than a purely *ministerial* one." (Emphasis added.) 244 U.S. 174, 182.

In *Cornelius v. Kessel,* 128 U.S. 456 (1888), the Court upheld the claim of the successors of a mining entrant whose entry was cancelled without notice over the claim of a subsequent party who obtained a patent from the government following the cancellation. The Court analyzed the applicant's rights as follows:

> "By . . . entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." 128 U.S. at 461.

This decision was followed in a series of cases vacating the orders of the General Land Office purporting to cancel mining claims without notice or hearing. Justice Van Devanter, who was largely responsible

for the development of the law relating to claims upon the public lands (see, *Best v. Humboldt Mining Company,* 371 U.S. 334, 336 (1963)), stated the law as follows:

> "A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they would work an unlawful, private appropriation and derogation of the rights of the public.
>
> "Of course, the Land Department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the government it does have power, *after proper notice and upon adequate hearing,* to determine whether the claim is valid and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard v. Alexander,* 157 U.S. 372, where, in giving effect to a decision of the Secretary of the Interior, canceling a pre-emption claim theretofore passed to cash entry, but still unpatented, this court said:
>
> 'The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot arbitrarily be dispossessed. His interest is subject to state taxation. (Citation). The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case *implies notice and a hearing.* But this does

not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.'" *Cameron v. United States,* 252 U.S. 450 at 459-460 (1920). (Emphasis added.)

Under the cited cases and basic principles of constitutional law, the allegations in Paragraph 4 of plaintiff's first cause of action state a claim giving the Court below jurisdiction to issue a writ of mandate directing defendant Udall to vacate the purported cancellation of plaintiff's coal mining entry and to issue plaintiff a patent to the land involved. Moreover, the great majority of the judges of the Court of Appeals for the District of Columbia where, prior to the enactment of 28 U.S.C. § 1391(e) in 1962, most land cases were decided, have held that recent decisions, including *Larsen v. Domestic & Foreign Corp.,* 337 U.S. 682 (1949), which limited the Court's power to enjoin government officers in other contexts do not limit the use of a writ of mandate in land cases. See *West Coast Exploration Co. v. McKay,* 213 F. 2d 582 (D.C. Cir., 1954), cert. denied, 347 U.S. 989; *Clackamas County v. McKay,* 219 F. 2d 479 (D.C. Cir., 1954), cert. granted and case dismissed as moot, 349 U.S. 909; *Seaton v. Texas Co.,* 256 F. 2d 718 (D.C. Cir., 1958); *Foster v. Seaton,* 271 F. 2d 836 (D.C. Cir., 1959).

The cited cases clearly establish that the District Court has jurisdiction to issue a mandatory order requiring defendant Udall to issue a patent. Because appellant was precluded from a proper hearing before the Secretary, however, it may be that the record

would not presently support such an order. If so, the District Court should be directed to remand the controversy to the Secretary for a hearing under 43 U.S.C. Section 1161, as prayed for in the Amended Complaint.

CONCLUSION

For the foregoing reasons appellant respectfully submits that the District Court erred in dismissing appellant's amended complaint and the action. Appellant, therefore, requests that the Court reverse the judgment of the District Court and direct that appellant be granted a patent or that the matter be remanded to the Secretary of Interior for hearing.

Dated, San Francisco, California,
June 27, 1966.

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Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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